JET-AGE CONSTRUCTION SDN. BHD. & ANOR.

v.

MODULE CONSTRUCTION SDN. BHD. & 5 ORS.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD GHAZALI BIN MOHD YUSOFF JC
[CIVIL SUIT NO. 22-119-1988]
4 JANUARY 1995

***PRACTICE & PROCEDURE**: - O. 33 r. 2 RHC 1980 - Preliminary points of law - Questions and issues arising in the cause of action to be determined before the trial of the action - Whether procedural requirements satisfied - Whether application should be filed before or shortly after close of pleadings - Whether facts of case to be ascertained first - Effect of law being unsettled on question raised.*

***LAND LAW**: Caveats - Whether wrongful - Whether first plaintiff could claim damages for wrongful caveat when application for removal of caveat filed on its behalf by Official Receiver - Whether caveatable interest existed - Whether caveator liable to pay damages when prior caveats existed during entry and removal - Whether cause of action for wrongful entry of caveat can be assigned.*

On 9 May 1988, plaintiffs filed suit against the defendants claiming that they had been greatly injured in the investment and development of a piece of land in Johor, had lost the right to re-sell it at a high profit, were put to considerable trouble, inconvenience and expenses and suffered loss and damage. The plaintiffs claimed damages and compensation against the defendants for wrongfully caveating the said land and for wrongfully and maliciously conspiring to defraud and injure the 1st plaintiff between 1 April 1981 and 9 December 1987. The 1st plaintiff alleged that it had purchased the land from the Official Receiver as Liquidator of one Mosbert Sdn Bhd by an agreement dated 1 April 1981 and had paid the full purchase price.

On 17 January 1982, the 2nd defendant lodged a caveat to bind the whole land on the ground of 26 re-assignments of the 1st defendant's rights over sub-lots of the land to the 2nd defendant. The 1st plaintiff claimed that registration of the said land into its name was not effected due to the caveat and requested a removal of the same by the 2nd defendant, which request was not acceded to.

The Official Receiver had the caveat removed by a High Court order dated 17 January 1987, which was affirmed by the Supreme Court. On 23 April 1988, the 1st plaintiff informed the defendants of the assignment of the land from the 1st to the 2nd plaintiff.

The defendants claimed that they had bought the rights over the sub-lots from the original purchasers prior to the sale of the land to the 1st plaintiff. They stated that there were other caveats lodged over the said land even before the 1st plaintiff entered into the agreement to purchase the land.

The action was set down to be tried on 7 November 1994. Prior to that, the defendants filed an application by way of summons in chambers under O. 33 r. 2 of the Rules of the High Court 1980 (RHC) for an order that the following questions or issues be determined before the trial:

(i) whether the tort of conspiracy for wrongful caveat exists by virtue of the Civil Law Act 1956 and the National Land Code;

(ii) whether the plaintiffs have a cause of action for the tort of conspiracy to lodge a wrongful caveat as pleaded;

(iii) whether the 1st plaintiff could now claim damages for alleged wrongful caveats when in fact the Official Receiver filed the application to remove the caveat on behalf of the 1st plaintiff;

(iv) whether the 2nd defendant had a caveatable interest on the land when the caveat was lodged;

(v) whether in law the 2nd defendant's caveat caused the alleged damages to the plaintiffs in view of the prior caveats at the time the 2nd defendant lodged its caveat and there being other caveats when the 2nd defendant's caveat was removed;

(vi) whether the 2nd plaintiff has a cause of action in respect of facts alleged in the statement of claim; and

(vii) whether the 1st plaintiff could in law assign its cause of action against the defendants in respect of the 2nd defendant's caveat.

In support of the application, the defendants filed an affidavit exhibiting 26 agreements relating to re-assignments entered into between the original purchasers of the sub-lots and the 1st defendant dated 20 June 1981 and copies of the Court judgments relating to the earlier proceedings by the Official Receiver to remove the caveat.

The plaintiffs argued that it was too late for the defendants to invoke O .33 r. 2 as the pleadings had closed and action set down for trial, that the issues raised cannot be tried by affidavits alone either to determine points of law or mixed law and facts and that those points of law were not raised in their defence.

The principal issue before the Court was whether there were merits in the defendant's application under O. 33 r. 2 to warrant an exercise of the Court's power that the questions posed be tried before the trial and whether the trial of these preliminary questions will result in a substantial saving of time and expenditure.

Held:

[1] The defendants had ample time to make the application after pleadings closed but waited until almost the eleventh hour before doing so. No reason had been put forward for the delay and upon this ground alone this application should be dismised.

[2] The pleadings and affidavits including the documents exhibited cannot amount to evidence adduced. The parties have also not submitted an agreed statement of facts or an agreed bundle of documents which could at least have assisted the Court. The principle is that no Court should decide a case on disputed facts and the order for trial of a preliminary point should not be made when facts are in dispute.

[3] It cannot be said that the voluminous questions posed by the defendants could save time and costs of the proceedings. The seven questions encompass the entire action and without an agreed statement of facts, the Court would be placed in a very difficult position as there are other facts beyond those that appear in the pleadings.

[4] The law posed by one of the questions is unsettled i.e. whether the tort of conspiracy exists for wrongful caveats and a decision on this point should only be made on ascertained facts. The Court will have to make findings of fact before determining the issue.

[5] The fact that it was the Official Receiver who made the application to the Court to have that caveat removed seems to imply that he had taken the responsibility upon himself to do so as the said land was then still vested in him as Liquidator and Receiver. The first plaintiff was not a party to that proceeding and as such the fisrt plaintiff is not estopped from claiming damages.

[6] The Court cannot determine the question as to whether the second defendant has a caveatable interest at his stage without sufficient proof as the defendants have not forwarded any documents which show that the original purchasers of the sub-lots have brought the interest from Mosbert Bhd or any evidence to substantiate whether the caveats lodged on the said land by other parties still exists.

[7] Whether the second plaintiff has a cause of action and whether the first plaintiff can assign its cause of action to the second plaintiff would depend upon what will be determined with regard to the issues raised earlier. The first plaintiff is a party to these proceedings and if the Court finds that the cause of action cannot be assigned that would not preclude the first plaintiff from pursuing the claim based upon his interest before the assignment.

[8] Several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such. The defendants have failed to satisfy the Court that the successful application would result in substantial saving of time and expenditure.

[Defendants' application dismissed].

Cases referred to:
S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors. (No.1) [1994] 1 CLJ 207 ***(dist)***
Bahgher Singh v. Chanan Singh & Anor. [1961] 27 MLJ 328 ***(refd)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co. and Ors. [1969] 1 Ch 93 CA ***(refd)***
Tengku Mariah bte Sultan Sulaiman v. Halimah bte Abdullah [1980] 2 MLJ 234 ***(refd)***
Richards v. Naum [1966] 3 All ER 812 ***(foll)***
Allen v. Gulf Oil Refining Ltd. [1981] 1 All ER 353 ***(refd)***
Tilling v. Whiteman [1980] AC 1 ***(refd)***
Easow Plantations Sdn. Bhd. v. Mosbert Berhad (In Liquidation) [1988] 1 MLJ 298 ***(refd)***

Legislation referred to:
National Land Code, ss. 322, 323 (2), 327, 329, 240
Rules of the High Court 1980, O. 18 r. 19, O. 33 r. 2
Civil Law Act 1956, s. 6

For the plaintiffs - P. Suppiah (S. Sagadeva with him), M/s. J. Singh & Co.
For the 1st, 2nd, 3rd & 6th defendants - D.P Naban (Sunny Liew Siew with him); M/s. Lee Hishamuddin
For the 5th defendant - Dominic Puthucheary; M/s. Skrine & Co.

JUDGMENT

Mohd Ghazali bin Mohd Yusoff JC:

On 9 May 1988, the plaintiffs brought an action against the defendants claiming that, as beneficial owners of a piece of land known as Lot 83, Johore Grant No. 72 and situated within the district of Johor Bahru (hereafter called "the said land"), containing an area of

approximately 113 acres, 2 roods and 20 poles, they have been "greatly injured in the investment and development thereof and have lost the right to resell it at a high profit at the appropriate time and they have been put to considerable trouble, inconvenience and expenses and have suffered loss and damage" and hence, claim damages and compensation against the defendants for wrongfully or without reasonable cause caveating the said land and for wrongfully and maliciously conspiring to defraud and to injure the first plaintiff between 1 April 1981 and 9 December 1987.

In the statement of claim, the first plaintiff contended that it had purchased the said land from the Official Receiver under an agreement dated 1 April 1981 for the sum of RM2,005,750 and had paid the full purchase price. The registered owner of the said land was Mosbert Bhd., which was wound up on 12 January 1977 by the High Court in Johor Bahru and in that proceeding the Court appointed the Official Receiver as Liquidator and Receiver for that company. The first plaintiff stated that upon payment of the full purchase price, the Official Receiver handed the issue document of title and the executed transfer to enable it to register the said land in its name as owner.

However, on 17 January 1982, the second defendant lodged a caveat expressed to bind the whole land itself. In the application to lodge the caveat, the second defendant stated that by 26 re-assignments dated 17 January 1982, the first defendant has re-assigned its rights over 30 sub-lots on the said land, containing an approximate area of 6,000 square feet each, to the second defendant.

The first plaintiff claimed that as a result of the caveat it was unable to effect registration of the said land into its name and consequently requested the second defendant to remove the caveat or alternatively to give its consent to the transfer subject to the caveat, but was not successful. The first plaintiff claimed that the defendants were fully aware that the said land had been purchased by the first plaintiff as the first defendant had also tendered for the said land and for an adjoining piece of land containing 116 acres and known as Lot No. 6, but was successful in purchasing only that adjoining piece of land.

The plaintiffs further contended that the defendants were fully aware of the purchase as the third to the sixth defendants, who are brothers and also advocates and solicitors, were either directors of the first and second defendants or were acting as solicitors for the first or second defendants at the relevant time. Furthermore the fourth defendant appeared as Counsel for the petitioner in the winding-up proceedings of Mosbert Bhd. The plaintiffs claimed that the defendants, by virtue of knowledge acquired with regard to the background leading to the purchase of the said land by the first plaintiff, had misused that information and had contacted the original purchasers of the sub-lots and consequently bought their rights on the said land.

In paragraph 34 of the statement of claim, the plaintiffs stated that the Official Receiver, in the name of Mosbert Bhd and for and on behalf of the first plaintiff, had on 2 November 1983 made an application in the High Court in Johor Bahru to remove the caveat lodged by the second defendant for the reason that the said land has been sold to the first plaintiff and for the further reason that the second defendant did not have a caveatable interest on the said land. Subsequently by an order of the High Court dated 17 January 1987 the said caveat was removed and on appeal the decision was upheld by the Supreme Court (as it then was). On 23 April 1988 the first plaintiff informed the defendants of the assignment of the said land from the first to the second plaintiff.

In their defence, the defendants denied the plaintiffs' claims and contended that the Supreme Court upheld the High Court's decision solely on the fact that the second defendant had not complied with the requirements of s. 323 (2) of the National Land Code when the caveat was lodged. That section provides that a person or body wishing to apply for the entry of a caveat shall specify therein the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only. The defendants also contended that they had bought the rights over the sub-lots from the original purchasers prior to the sale of the said land to the first plaintiff. Furthermore they stated that there were also other caveats lodged in respect of the said land even before the first plaintiff entered into the said agreement to purchase it.

The action, after an adjournment at the request of the defendants, was finally set down for trial on 7 November 1994 but prior to that date, the defendants filed an application by way of summons in chambers requesting the Court to evoke O. 33, r. 2 of the Rules of the High Court 1980 for an order that the following questions or issues arising in the cause of the action be determined first before the trial, namely:

1.(a) Does the tort of conspiracy in respect of wrongful caveats exist by reason of the provisions of the Civil Law Act 1956 and the National Land Code.

(b) Alternative to objection (1) above and in any event, do any of the plaintiffs have a cause of action against the defendants in the tort of conspiracy to lodge a wrongful caveat on the facts as pleaded in the statement of claim.

(c) Can the first plaintiff now claim damages against the second defendant for allegedly lodging wrongful or without reasonable cause caveats, when in fact the application to remove filed by the Official Receiver in the name of Mosbert Bhd was for and on behalf of the first plaintiff as stated in paragraph 34 of the statement of claim.

(d) Did the second defendant have a caveatable interest on the subject land at the time it lodged its caveat?

(e) Could, in law, the caveat lodged by the second defendant have caused the plaintiffs to suffer the damages allegedly suffered by the plaintiffs in view of there being other prior caveats at the time when the second defendant lodged its caveat and there being other caveats at the time when the second defendant's caveat was removed?

(f) Does the second plaintiff have a cause of action against the defendants in respect of the facts alleged in the statement of claim?

(g) Could the first plaintiff, in law, assign its cause of action against the defendants (if such existed in law) in respect of the caveat lodged by the second defendant?

The defendants' affidavit in support of the application states that if these questions or issues of law are determined by the Court in favour of the defendants at the outset, the consequential affect could be that the plaintiffs' claim would be dismissed. Affixed to the said affidavit were copies of 26 agreements relating to the re-assignments entered into between the original purchasers of the sub-lots and the first defendant which were dated 20 June 1981 except for one agreement which was dated 23 November 1982, and also attached therewith were copies of the judgments of both the High Court and Supreme Court with regard to the earlier proceedings instituted by the Official Receiver relating to the caveat lodged by the second defendant as discussed above.

In their affidavit in reply, the plaintiffs opposed the application contending that it was too late in the day for the defendants to file such an application as the writ itself, together with the statement of claim, was filed on 9 May 1988, the pleadings had closed and that the action has been set down for trial.

The plaintiffs contended that the questions or issues raised in the pleadings cannot be tried by affidavits alone either to determine points of law or mixed law and facts; furthermore the defendants have not raised those points of law in their defence to enable them to make the application. The plaintiffs further contended that the application is misconceived and urged the Court to dismiss it and to let the action proceed as fixed.

As both the application and the action has been set down for trial on the same day, I ordered that the application be heard first, O. 33, r. 2 of the Rules reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

Counsel for the defendants submitted that the questions or issues which he had put forth before the Court to be decided, if his application is allowed, would, if determined, be decisive of the whole proceedings. He argued that those questions or issues are serious questions or issues of law that should be ordered to be set down and argued before the trial, even though they have not been raised in the pleadings.

He then submitted that in *S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors.* (No.1) [1994] 1 CLJ 207, the defendants had raised a similar application in the midst of the trial and that the Court granted them leave to do so whereas in the instant case the defendants' application is made before commencement of the whole trial. He then referred to what the Judge said, at p. 212, with regard to O. 33, r. 2:

> ... the present O. 33 r. 2 is wider in terms for it is also applicable to questions of fact or questions partly of fact and partly of law raised by a party to the suit "before, at and after the trial" of the suit. However that may be, in deciding whether to allow the preliminary questions to be raised at the trial the Court must bear in mind the following observations enunciated in the aforementioned cases:
>
> (1) As a general rule, the Court will exercise its power under O. 33 r. 2 to order a preliminary question to be tried if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.

Counsel for the defendants submitted that his first two questions or issues were framed on the basis of the contents of the plaintiffs' statement of claim, namely, that the defendants have conspired to lodge a caveat to cause harm and damage to the plaintiffs. He contended that these are questions of law which need to be decided first as such cause of action, namely, a tort of conspiracy in respect of wrongful caveats, does not exist in Malaysia. He argued that a caveat is a creature of statute, namely, the National Land Code; this Code is comprehensive and by virtue of this Code, there cannot be intervention of common law. Furthermore, as the matter involves land law, s. 6 of the Civil Law Act 1956 makes it sufficiently clear that English law cannot apply. Section 6 reads:

> Nothing in this part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

Counsel pointed out that s. 322 of the Code gives the right to lodge caveats and the procedure is as set out in s. 323. For removal of caveats, the procedure is provided for in s. 327 of the Code which reads:

> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

With regard to compensation for wrongful caveats, Counsel pointed out that an aggrieved party can resort to s. 329 of the Code which reads:

> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

Counsel then submitted that since the above provisions of the Code are comprehensive, there is no necessity for the plaintiffs to seek assistance from common law. He then referred to *Bahgher Singh v. Chanan Singh & Anor.* [1961] 27 MLJ 328 where it was held (at p. 330) that the Malaysian Courts can only apply the common law of England and the rules of equity as provided for in s. 3(1) of the Civil Law Act 1956 if there is a *lacuna* in the law; in the instant case, there is no *lacuna*.

With regard to the third question, which raised an issue of estoppel, Counsel for the defendants argued that paragraph 34 of the plaintiffs' statement of claim states that there had been an application to remove the caveat by the first plaintiff using the name of Mosbert Bhd. As such, the plaintiffs should have taken the opportunity to claim for damages and compensation in that application and that they are now estopped from doing so in this suit. To support his argument, he referred to the case of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581. where with regard to the application of the doctrine of estoppel, namely *res judicata*, Lord Kilbrandon said (at p. 590):

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the Judge says:
>
> > . . .where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Counsel submitted that based upon the above authorities the plaintiffs are now estopped from claiming damages and compensation and that that issue of damages and compensation should have been raised in that earlier proceeding. Furthermore, the second plaintiff's role in this action is only that of an assignee of the first plaintiff and legally there cannot be an assignment of a wrongful tort. He then concluded that as far as the first three questions or issues raised in his application are concerned, the provisions of the National Land Code are comprehensive and there is no necessity to seek assistance from common law. He argued

that the entire claim of the plaintiffs is based on conspiracy and that even if there is a conspiracy to lodge the caveat, the tort of conspiracy has merged with the wrongful act of lodging the caveat where the remedy is provided for in the National Land Code. He submitted that if the Court determines these issues before the hearing of the action as a whole, the whole action may be disposed of thus saving much time and costs.

With regard to the fourth question or issue, that is, as to whether the second defendant has a caveatable interest, Counsel submitted that when that defendant lodged the caveat, it believed it had a caveatable interest as it had purchased the rights of the various purchasers of the sub-lots from the first defendant. Hence, if this question is determined at the outset and the second defendant can prove that it has a caveatable interest, the plaintiffs will have to show that the second defendant wrongfully lodged the caveat. He argued that the plaintiffs brought up the issue of conspiracy as they could not prove damages under s. 329 of the Code.

On the fifth question which raised the issue of the existence of other caveats on the said land at the relevant time, Counsel submitted that this is a question of causation and therefore a question of law. He said the defendants could not in law cause the damage as there is no point in law to ascertain the damage since there are other caveats lodged against the said land and therefore, how can it be said that the defendants had caused the damage?

With regard to the sixth and seventh questions which raise the issue of jurisdiction, Counsel argued that the second plaintiff is claiming on the basis that it is the assignee of the rights and assuming that the Court holds that the agreement is void, it would be decisive of litigation.

Counsel concluded that there are merits in the application and that if these questions are decided at the outset, it will save time, costs and convenience and would expeditiously dispose of the matter.

In opposing the application, Counsel for the plaintiffs insisted that the defendants can only make this application if they had pleaded the matters raised therein. He argued that if the defendants felt that the plaintiffs have no cause of action, they should have applied to strike out the action under O. 18 r. 19 of the Rules. He submitted that the defendants, who are advocates and solicitors, are also shareholders and directors of the first defendant. He argued that the first defendant, as a company, can only act through its agents and contended that the third to the sixth defendants had used the first defendant to purchase the rights to the sub-lots and later transferred those rights to the second defendant, which is only a RM2 (two ringgit) paid-up company and subsequently used the latter to caveat the said land.

Thus, the issue before me is whether there are merits in the application to warrant the Court to exercise its power under O. 33, r. 2 of the Rules and order that those questions or issues posed by the defendants in this application be tried before this action goes on trial as a whole and whether the trial of those preliminary questions or issues will result in a substantial saving of time and expenditure.

Counsel for the plaintiffs had earlier contended that the application was made too late in the day as the writ was filed on 9 May 1988 and that pleadings have closed. I agree with this contention. In *Carl Zeiss Stiftung v. Herbert Smith & Co. and Ors.* [1969] 1 Ch 93 CA, at p. 98, the Judge said:

> The true rule was stated by Romer LJ in *Everett v Ribbands* [1952] 2 QB 198:
>
> > Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules

> of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings.

In that case, the Judge seems to suggest that the opportune time to take advantage of such rule would be at the close of pleadings or very shortly after the close of pleadings. The records of the instant case shows otherwise. On 4 September 1993, on the application of the plaintiffs, the Court ordered that an early date be given for the suit to be heard and subsequently the action was set down for trial on 2 April 1994. However on that date the matter was adjourned upon request by the defendants on the ground that the sixth defendant has suffered a stroke and could not attend Court. I find that the records clearly show that the defendants had ample time to make this application after pleadings had closed but had waited until almost the eleventh hour before doing so. They had not put forth any reason for the delay and upon this ground alone I am of the view that this application should be dismissed. In my view the decision in *S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors.* (No.1), referred to earlier, was based on different considerations, namely, the application was made by the defendants at the close of the case for the plaintiffs. In that case, the Court allowed the application but reframed the question posed and based it upon the evidence adduced by the plaintiffs; the question or issue allowed in that case (as stated at p. 215 of the report) is as follows:

> Even if the evidence adduced by or on behalf of the plaintiffs is accepted *in toto* and is unrebutted or unexplained by the defendants, they have not succeeded in showing that they were entitled to the reliefs they are claiming because as a matter of law, they are not entitled to claim those reliefs.

In the above-mentioned case the defendants have managed to pose a question of law, which if decided in their favour, would dispense with any further trial since the plaintiffs have adduced evidence. In the instant case, the contents of the pleadings and affidavits including the documents attached therein cannot, under the circumstances, amount to evidence adduced neither have the parties submitted an agreed statement of facts or an agreed bundle of documents which could have at least assist the Court in giving due consideration to the application. It is clear that no Court should decide a case when facts are disputed and the order for the trial of a preliminary point of law should not be made where there are facts in dispute. In the instant case, several facts are disputed.

Be that as it may, I find that the questions or issues posed by the defendants, being voluminous, may not actually save time and costs of the legal proceedings even if this application is allowed upon only one of the questions or issues raised. To me, those seven questions or issues encompass the entire action and without an agreed statement of facts, the Court would be placed in a very difficult position to try those preliminary questions or issues as there could be other facts beyond those that appear in the pleadings; for example, the defendants contended that they bought the rights over the sub-lots from the original purchasers prior to the sale of the said land to the first plaintiff whereas most of the agreements entered into between the original purchasers and the first defendant, copies of which are attached to the defendants' affidavit, show otherwise.

Furthermore, the law posed by one of those questions, in my opinion, is unsettled, namely, the defendants argued that the tort of conspiracy in respect of wrongful caveats does not exist in this country by reasons of the provisions of the National Land Code. To me, this is a difficult and important question of law, and before the Court can make a decision on this point, the facts of the instant case should be ascertained first.

In my opinion, it would not suffice in an application of this nature for the defendants to merely put forth the argument that in the field of land law in Malaysia, the provisions of the Civil Law Act 1956 have ousted principles of law based upon common law or equity. There are several authorities where the Malaysian Courts have applied equitable principles in the field of land law, for example, in our system of land proprietorship, the title is everything and s. 340 of the National Land Code provides for indefeasibility of title and interest, namely, the title or interest of any person or body for the time being registered as proprietor of any land, etc., shall be indefeasible unless there is fraud or misrepresentation or where registration was obtained by forgery or was unlawfully acquired. An example of an instance where the Malaysian Courts have imported principles of equity in disputes relating to land proprietorship is the case of *Tengku Mariah bte Sultan Sulaiman v. Halimah bte Abdullah* [1980] 2 MLJ 234 where the then Federal Court held that as the facts showed that the respondent was in possession of the land and had built two or three houses on it, she was the equitable owner of the land.

In the instant case, the plaintiffs have alleged that the defendants had wrongfully or without reasonable cause, through the second defendant, a company, lodged a caveat against the said land and had wrongfully and maliciously conspired to defraud and injure the first plaintiff. The defendants have denied this which, to me, would now mean that the plaintiffs have to prove that there was such a conspiracy before they can succeed in this action. The fact that the plaintiffs have alleged that the third to the sixth defendants have used the first and second defendants, which are companies, to frustrate the plaintiffs rights to the said land need to be proved. It is therefore clear that the Court will have to hear the evidence and make its findings of fact before it can determine this issue.

The attitude of the English Courts with regard to trying preliminary questions of law before the suit itself is best illustrated in *Richards v. Naum* [1966] 3 All ER 812. In that case, the defendant had requested that the following question be tried as a preliminary point, namely whether a Colonel in the US Air Force is entitled to absolute privilege in an action against him for libel by a civilian employee in the same force; the defendant was relying on a provision in the Visiting Forces Act 1952. At p. 815, Lord Denning, MR said:

> If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say: "You must get the facts before we decide the law." Rather than put the parties to all that expense (and, I may add, delay), I think that we should have the facts ascertained in the trial Court before the difficult and important point of law is decided.
>
> This is not a case which should be delayed. The events took place at the end of 1963. The action was started in February 1964. It is now nearly three years later. An action such as this should come on with utmost expedition, and not be delayed by arguments on points of law.

In the instant case, the events took place between 1981 and 1987 and the action was started in May 1988. It is now nearly eight years later. In *Allen v. Gulf Oil Refining Ltd.* [1981] 1 All ER 353 the Court cautioned against allowing trial of preliminary questions of law and said that such questions should be carefully and precisely framed. At p. 364, Lord Roskill said:

> My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered. But I hope your Lordships' agreement so to treat it will not encourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy.

On the same note, Lord Wilberforce has this to say in *Tilling v. Whiteman* [1980] AC 1, at p. 17:

> The learned Judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of Courts of Appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.

Section 3(1) of the Civil Law Act which introduces the application of the United Kingdom common law and rules of equity in West Malaysia is subject to the saving provision with which it opens, namely, **"Save so far as other provisions has been made or may hereafter be made by any written law in force in Malaysia . . . "**. The English rules of equity cannot be imported if they are inconsistent with the provisions of the Code. In relation to caveats, it is clear that there are express provisions in the National Land Code. But as to whether a tort of conspiracy in respect of wrongful caveats exist is a question of law which has yet to be settled by our Courts. Furthermore as to whether caveats would fall within the contemplation of the words **"tenure or conveyance or assurance of or succession to any immovable property or estate, right or interest"** as found in s. 6 of the Civil Law Act will also have to be determined.

On the issue of damages claimed by the plaintiffs, s. 329 of the Code allows any person or body who suffers any damage or loss to claim compensation from the party who enters a wrongful caveat. Based upon the facts found in the pleadings in the instant case, can the Court at this stage determine that because there is no such thing as a tort of conspiracy in respect of wrongful caveats, the plaintiffs are now precluded from claiming compensation under s. 329 of the Code? If at all, the plaintiffs' allegation of conspiracy adds nothing to their claim, would they still be precluded from claiming compensation under the said s. 329 of the Code? To me, these questions can only be answered at the end of a full trial of the action.

With regard to the issue of estoppel, the defendants argued that since the Official Receiver filed the application for the removal of the caveat in the name of Mosbert Bhd., but for and on behalf of the first plaintiff, the latter is now estopped from claiming for damages in the instant case since it was not raised in that proceeding initiated by the Official Receiver. It is clear that when the Official Receiver sold the said land to the first plaintiff on 1 April 1981, the caveat lodged by the second defendant had yet to exist. It was only when the first plaintiff attempted to effect the registration of the said land to itself that it was discovered that the second defendant had lodged a caveat. The fact that it was the Official Receiver who made the application to the Court to have that caveat removed seems to imply that he had taken the responsibility upon himself to do so as the said land was then still vested in him as Liquidator and Receiver. The first plaintiff was not a party to that proceeding and as such I cannot see how an estoppel can operate against it in this suit. It could have operated against the first plaintiff had it been a party to that proceeding which was the case in *Yat Tung Co. Ltd. v. Dao Heng Bank Ltd. & Anor.*, referred to earlier. The fact that the Official Receiver did not claim for damages surely cannot preclude the plaintiffs from pursuing his claim for damages in a separate action.

With regard to the question as to whether the second defendant had a caveatable interest on the said land at the time it lodged the caveat, the defendants have, in my view, raised an issue which has been answered by the Supreme Court (as it then was) in *Easow Plantations Sdn. Bhd. v. Mosbert Berhad (In Liquidation)* [1988] 1 MLJ 298. At p. 299 of the report, Salleh Abbas LP said:

> However, there is one material question which Easow had to surmount, in that under s. 323 subsection (2), it has to state the nature of the claim on which the application is based. In its caveat entry application (Form 19B), Easow claimed the 26 sublots by virtue of an assignment it took from another company called Module Construction Sdn. Bhd. The application, however, did not say how Module Construction obtained its interest in the land. There is simply no connection between Module Construction and the purchaser or Mosbert Berhad. Since the land is vested in Mosbert Berhad, this missing link, in our view, does not satisfy the requirement of s. 323 subsection (2). Hence the conclusion reached by the learned Judge is unassailable.

Since there is a "missing link" as stated by the Supreme Court, and that "missing link" is still missing in this application, namely, the defendants have not forwarded in their affidavit any document which could show that the original purchasers of the sub-lots have bought the interests from Mosbert Bhd., I cannot see how the Court can determine the question as to whether the second defendant has a caveatable interest at this stage without sufficient proof. Furthermore the defendants have also not forwarded any evidence to substantiate whether the caveats lodged on the said land by other parties are still existing or have been removed.

Copies of the re-assignment agreements entered into between the original purchasers of the sub-lots and the first defendant which are attached to the defendants' affidavit show that 25 out of 26 agreements were dated 20 June 1981 whereas the first plaintiff claimed that he bought the said land from the Official Receiver on 1 April 1981. The question which has arisen is why did the first defendant buy over these sub-lots if at all it was aware that the first plaintiff was successful in bidding for the land and had consequently bought it from the Official Receiver? To me, these questions and the implication of the defendants' actions can only be answered after a trial of the whole suit.

With regard to the question or issue as to whether the second plaintiff has a cause of action and as to whether the first plaintiff can assign its cause of action to the second plaintiff, would, I think, depend upon what will be determined with regard to the issues raised earlier in the first two questions posed. In the statement of claim, the plaintiffs stated that on 23 April 1988 the first plaintiff sold the said land to the second plaintiff and assigned its rights to the second plaintiff. The first plaintiff is a party to these proceedings and if the Court finds that the cause of action cannot be assigned, in my opinion, that would not preclude the first plaintiff from pursuing the claim based upon his interest before the assignment.

In conclusion I find that the defendants have failed to satisfy me that their application, if allowed, will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole. The several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such. That being so, I dismiss this application with costs and direct that an early date be set down once again for trial of the whole action.